STATE OF MICHIGAN

COURT OF APPEALS

KELLEY BULA,

Plaintiff-Appellant,

v

JAMES WAYNE FIFIELD, III and JAMES WAYNE FIFIELD, JR.,

Defendants-Appellees.

UNPUBLISHED
May 25, 2010

No. 290544
Oakland Circuit Court
LC No. 2008-093722-NO

Before: SAAD, P.J., and HOEKSTRA and SERVITTO, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting summary disposition in favor of both defendants. We reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This action arises from an automobile accident on September 2, 2005, involving a collision between plaintiff's vehicle and a vehicle driven by defendant James Wayne Fifield III (the "son") that was owned by defendant James Wayne Fifield, Jr. (the "father"). Plaintiff filed her complaint on August 12, 2008, alleging a claim against the son for negligence, and a claim against the father under the owner's liability statute, MCL 257.401. A complaint and summons addressed to "James W. Fifield, Sr." was served by certified mail. The return receipt was signed by "James W. Fifield, Jr." and showed the printed name "James W. Fifield." On November 10, 2008, two days before the summons expired, the father was served in person.[1] Both defendants later moved for summary disposition.

[1] The parties' briefs contain factual assertions concerning defense counsel's role in plaintiff's failure to serve the son that are not supported by the record. Further, exhibits B and F to defendants' brief on appeal were created after the trial court granted summary disposition and are not part of the lower court record. MCR 7.210(A). Because this Court's review is limited to the record presented to the trial court, *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990), we will not consider the above-described exhibits.

The trial court granted summary disposition of plaintiff's negligence claim against the son pursuant to MCR 2.116(C)(1) (lack of jurisdiction), (3) (insufficient service of process), and (7) (statute of limitations), because it concluded that he was not served before both the summons and the applicable limitations period expired. Further, relying on MCR 2.504(B)(3) and *Al-Shimmari v Detroit Medical Ctr*, 477 Mich 280, 295; 731 NW2d 29 (2007), the court granted summary disposition of plaintiff's owner's liability claim against the father pursuant to MCR 2.116(C)(10) (no genuine issue of fact), because it concluded that dismissal of the claim against the son pursuant to MCR 2.116(C)(7) was an adjudication on the merits that prevented plaintiff from proving that she was injured by the negligent operation of a motor vehicle, thereby precluding her from prevailing on her owner's liability claim against the father.

This Court reviews a trial court's decision granting summary disposition de novo. *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 60; 718 NW2d 784 (2006). The interpretation of a court rule is a question of law that is also reviewed de novo. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

I. Dismissal of Plaintiff's Claim Against the Son

Plaintiff argues that although service on the son was flawed, MCR 2.105(J)(3) does not require dismissal where a defendant learns about the action through other means. Plaintiff argues that even if the service of process rules were not technically satisfied with respect to the son, a copy of the summons and complaint were left with his father at the home where the son was domiciled, and both the insurance company and defense counsel received timely notice.

MCR 2.105(J)(3) states that "[a]n action shall not be dismissed for improper service of process unless the service failed to inform the defendant of the action within the time provided in these rules for service." Relying on this rule, this Court has held that dismissal for improper service of process is inappropriate where a defendant was not served in compliance with the court rules, but was aware of the pending action. In *Bunner v Blow-Rite Insulation Co*, 162 Mich App 669, 673-674; 413 NW2d 474 (1987), this Court explained:

> This Court has held that service-of-process rules are intended to satisfy the due process requirement that a defendant be informed of the pendency of an action by the best means available, by methods reasonably calculated to give a defendant actual notice of the proceeding and an opportunity to be heard and to present objections or defenses. If the defendant actually receives a copy of the summons and complaint within the time permitted by the court rules, the defendant cannot have the action dismissed on the ground that the manner of service contravened the rules. *Hill v Frawley*, 155 Mich App 611, 613; 400 NW2d 328 (1986). MCR 2.105(J)(3) is not stated in discretionary terms. Neither errors in the content of the service nor in the manner of service are to result in dismissal unless the errors are so serious as to cause the process to fail in its fundamental purpose. See 1 Martin, Dean & Webster, Michigan Court Rules Practice (3d ed), p 105.

As defendants correctly argue, MCR 2.105(J)(3) does not apply where there is "a complete failure of service of process." *Holliday v Townley*, 189 Mich App 424, 425; 473 NW2d 733 (1991). Contrary to defendants' position, however, the facts presented here did not

establish a "complete failure of service of process." Two proofs of service appear in the record: one addressing James Wayne Fifield, Sr. and one addressing James Fifield, II. There was apparently confusion concerning how defendants referenced themselves, with it coming to light later that the father was referred to as James Fifield, Jr. and the son as James Fifield, III. It appears however, that the father received both copies of the summons and complaint naming both him and his son as defendants. In any event, the record discloses that plaintiff sent a copy of both the summons and the complaint for the son at the father's address, whether he received it or not. The applicability of MCR 2.105(J)(3) depends on whether the service "failed to inform the [son] of the action within the time provided in these rules for service." If the son was "aware of" the pending action as a result of the service on the father within 91 days after the date the complaint was filed, then dismissal for improper service would be inappropriate under MCR 2.105(J)(3). *Bunner,* 162 Mich App at 672-673; *Hill,* 155 Mich App at 613. However, the facts on this point have not been established. Although the son submitted an affidavit in which he averred that "a copy of the Summons and Complaint in the above action has not been served upon me by personal delivery or any other method authorized by law," he did not aver his lack of notice regarding the pending action.

As explained in *Al-Shimmari,* 477 Mich at 288-289, a trial court may hold a bench trial to determine disputed issues of fact relating to a motion challenging the sufficiency of service. The trial court never specifically determined that the son did not receive notice of the pending action. Absent evidence and a determination whether the service failed to inform the son of the action within the time provided in the court rules for service of process, MCR 2.105(J)(3) precluded the trial court from dismissing the action for improper service of process. Accordingly, we reverse the dismissal of plaintiff's negligence claim against the son and remand for further proceedings to determine whether the service failed to timely inform the son of the action.

II. Dismissal of Plaintiff's Claim Against the Father

Plaintiff brought an owner's liability claim against the father pursuant to MCL 257.401(1), which states, in pertinent part:

> The owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle whether the negligence consists of a violation of a statute of this state or the ordinary care standard required by common law.

Relying on *Al-Shimmari,* 477 Mich at 295, the trial court determined that dismissal of the claim against the son pursuant to MCR 2.116(C)(7) was an adjudication on the merits that prevented plaintiff from establishing that she was injured by the negligent operation of a vehicle, thereby entitling the father to summary disposition. We disagree.

Even if plaintiff's claim against the son is ultimately dismissed pursuant to MCR 2.116(C)(7), such an adjudication does not compel dismissal of plaintiff's owner's liability claim against the father. In *Al-Shimmari,* the plaintiff filed a medical malpractice action alleging improper treatment by Dr. Rengachary, and the vicarious liability of other defendants. The plaintiff's malpractice claim against Dr. Rengachary was dismissed with prejudice because the plaintiff did not serve Dr. Rengachary before the limitations period expired. The Supreme Court

agreed that the plaintiff's vicarious liability claims against the remaining defendants were also required to be dismissed, explaining:

> Because the remaining defendants may only be vicariously liable on the basis of the imputed negligence of Rengachary, plaintiff must demonstrate that Rengachary was negligent in order for the remaining defendants to be found vicariously liable. However, the dismissal of the claims against Rengachary operates as an adjudication on the merits of the claims against Rengachary. Plaintiff consequently is unable to show that the remaining defendants are vicariously liable for the acts of Rengachary, because the dismissal of the claims against Rengachary prevents plaintiff from arguing the merits of the negligence claim against Rengachary. Therefore, the Court of Appeals erred by concluding that the vicarious liability claims against the remaining defendants could proceed if the claims against Rengachary were dismissed for failure to be served process within the statute of limitations period. [*Al-Shimmari*, 477 Mich at 295-296.]

However, in *Freed v Salas*, 286 Mich App 300; ___ NW2d ___ (2009), this Court recently held that the holdings in *Al-Shimmari* do not apply in the vehicle owner-liability context. In *Freed*, the plaintiff's decedent was killed when an ambulance in which he was riding collided with a Waste Management garbage truck driven by defendant William Whitty. The plaintiff asserted, among other things, an owner's liability claim against Waste Management. During trial, with the agreement of counsel, the court dismissed Whitty with prejudice. Waste Management argued that the trial court erred in denying its motion for judgment notwithstanding the verdict because the dismissal with prejudice of the claim against Whitty should have resulted in the dismissal of the plaintiff's owner's liability claim against Waste Management. This Court rejected the applicability of *Al-Shimmari*, stating:

> Given that the underlying relationship that results in liability of a hospital is agency, and agency law is inapplicable to the owner's liability statute, we conclude that the holdings of *Al-Shimmari*, which are clearly based on an agency relationship, are not applicable on the vehicle owner-liability context. [*Freed*, 286 Mich App at 306.]

Thus, the Court held that the "owner's liability claim survived Whitty's dismissal." *Id*.

As in *Freed*, plaintiff's owner's liability claim against the father should survive, regardless of the viability of the claim against the son. Accordingly, we reverse the trial court's dismissal of plaintiff's owner's liability claim against the father.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Deborah A. Servitto